Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

KELVIN LEDAL HORTON,
(also known as Kevin),

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether all but one of the circuits have erroneously interpreted this Court's holding in *Apprendi v. New Jersey* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

2. Where a trial court errs by treating as a sentencing factor a fact that authorizes a statutory maximum penalty that is higher than the statutory maximum penalty authorized for the offense of which the defendant was convicted, is that error rendered harmless merely because the sentence imposed on the defendant does not exceed the statutory maximum prescribed for the offense of conviction?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Kelvin Ledal Horton respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App., *infra*, 1-2) is unreported. The judgment of the United States District Court for the Southern District of Texas (App., *infra*, 3-15) is also unreported.

JURISDICTION

The court of appeals entered its judgment on February 13, 2001. On May 4, 2001, Justice Scalia signed an order extending the time for filing this petition for certiorari to and including July 13, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution, which provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless

> on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law.

2. The Sixth Amendment of the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS INVOLVED

1. 21 U.S.C. § 841(a)(1), (b)(1)(A), (B), and (C), which is reprinted *infra*, App. 16-22.

2. 21 U.S.C. § 846, which provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

U.S. SENTENCING GUIDELINES INVOLVED

U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a), (c)(1)-(8), which is reprinted *infra*, App. 23-31.

STATEMENT OF THE CASE

On March 16, 1999, a federal grand jury filed a multi-count indictment with the United States District Court for the Southern District of Texas, charging Kelvin Ledal Horton with one count of conspiracy "to possess with intent to distribute the Schedule II controlled substances cocaine and cocaine base, commonly known as 'crack,' in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A), 841(b)(1)(B), 841(b)(1)(C), and 846." Record I:4. The district court had subject-matter jurisdiction over this case under 18 U.S.C. § 3231.

On October 25, 1999, Mr. Horton pleaded guilty to the charge before a magistrate judge who conducted a hearing to determine whether Mr. Horton's plea should be accepted. During that hearing the magistrate judge asked Mr. Horton whether he understood that by pleading guilty to the charge, he was giving up his right to a trial at which the government would "have to prove [ ] three things beyond a reasonable doubt": (1) that he intentionally entered into an agreement with other people, (2) that that agreement was to possess with the intent to distribute or to sell crack cocaine, and (3) that the substances that he was dealing with as part of that conspiracy were, in fact, cocaine and crack cocaine. Record II:25-26. At the end of the hearing the magistrate judge

recommended that the district court accept Mr. Horton's guilty plea.

As its judgment reflects, the district court accepted Mr. Horton's guilty plea and found him guilty as charged in the indictment, that is, guilty of "[c]onspiracy to possess with intent to distribute cocaine and cocaine base" in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), (b)(1)(B), (b)(1)(C), and 846. App. 3. The district court held a sentencing hearing on May 17, 2000. Based on the drug quantity attributed to Mr. Horton and part of the criminal history in the Presentence Report [PSR], the district court sentenced Mr. Horton to 151 months' imprisonment and 5 years of supervised release. App. 13-14.

Mr. Horton objected to the finding of drug quantity in the PSR both in his written objections to the PSR filed before the sentencing hearing and at the hearing. That finding – 878.85 grams of cocaine powder and 286.26 grams of cocaine base – was primarily based on (1) audio and visual surveillance of the home of Terry Lee Scott, whose distribution activities were the target of an FBI investigation and (2) the information that Mr. Scott provided to the FBI after his arrest in exchange for the government's agreement that the criminal history information that he disclosed would not be factored into his sentencing calculation. Pursuant to the U.S. Sentencing Guidelines [Guidelines], the PSR converted the amounts of cocaine powder and cocaine base to 5900.97 kilograms of "marijuana." Then, applying § 2D1.1(c) of the Guidelines, which ties the base-offense levels for §§ 841 and 846 offenses to drug quantity, the PSR assigned Mr. Horton a base-offense level of 34.

After the government told the district court that it "had nothing further to add" to the PSR, the district court overruled Mr. Horton's objection and adopted the PSR's drug-quantity finding. Record III:6-7. Accordingly, the district court assigned Mr. Horton a base-offense level of 34. The district court then deducted three points for acceptance of responsibility and incorporated the criminal history category of IV, which yielded an imprisonment range of 151 to 188 months and a mandatory 5-year term of supervised release. The district court sentenced Mr. Horton to 151 months' imprisonment and 5 years of supervised release.

Mr. Horton appealed his sentence on the ground that the district court had erred in adopting the PSR's drug-quantity finding without further verification. In a per curiam opinion, a panel of the U.S. Court of Appeals for the Fifth Circuit affirmed Mr. Horton's sentence. The court of appeals concluded that the district court's adoption of the drug-quantity finding was a factual finding of a sentencing factor subject to review for clear error. App. 2. Because Mr. Horton "did not present any rebuttal evidence to refute the amounts," the Fifth Circuit determined that "the district court properly adopted the PSR facts without further inquiry," and thus did not commit clear error in attributing the drug quantity in the PSR to Mr. Horton. *Id.*[1]

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[1] Mr. Horton's current counsel was appointed to prepare and file a petition for certiorari on his behalf approximately one month after his prior counsel withdrew, and approximately 60 days after the court of appeals entered its judgment. His prior counsel did not file a petition for rehearing in the court of

REASONS FOR GRANTING THE WRIT

Where a defendant is convicted of an offense of which drug quantity is *not* an element and that carries a statutory maximum penalty of 20 years' imprisonment, is it permissible for the judge to treat as a mere sentencing factor a drug quantity that authorizes a statutory maximum penalty of life imprisonment, provided that the penalty imposed does not exceed the 20-year statutory maximum for the offense of conviction? The court of appeals below and all but one of the other circuit courts have concluded that the answer to that question is yes. The petitioner is persuaded that on a proper reading of *Apprendi v. New Jersey*, the answer is no. If the petitioner is right, and all but one of the circuit courts are wrong, many defendants are probably now being, and many defendants probably will be, punished in violation of their Fifth and Sixth Amendment rights.

I. THE INTERPRETATION OF *APPRENDI* HELD BY THE COURT BELOW AND ALL THE OTHER CIRCUIT COURTS EXCEPT ONE CONFLICTS WITH *APPRENDI* ITSELF AND WITH THIS COURT'S EARLIER FIFTH AND SIXTH AMENDMENT CASES.

In the wake of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), there have been many cases across the circuits

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appeals. Shortly after his current counsel files this petition, she will file with the court of appeals a motion to recall its mandate and to consider Mr. Horton's untimely petition for panel rehearing.

requiring the courts to apply *Apprendi* to 21 U.S.C. § 841.[2] In the process, the circuits have interpreted this Court's holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. The circuit split is over whether the increase in "the penalty beyond the prescribed statutory maximum" that triggers Fifth and Sixth Amendment rights is the penalty to which a defendant is *exposed* as a result of a factual finding, or the penalty *imposed* on the defendant as a result of the factual finding.

Under § 841(a)(1), it is unlawful to "knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." App. 16. Section 841(b)(1) prescribes penalty ranges according to drug quantity and type:

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[2] *United States v. Fields*, 242 F.3d 393, 395-96 (CA D.C. 2001); *United States v. White*, 240 F.3d 127, 136 (CA2 2001); *United States v. LaFreniere*, 236 F.3d 41, 49 (CA1 2001); *United States v. Nance*, 236 F.3d 820, 824 (CA7 2000); *United States v. Williams*, 235 F.3d 858, 863 & n.4 (CA3 2000); *United States v. Page*, 232 F.3d 536, 543 (CA6 2000); *United States v. Jones*, 235 F.3d 1231, 1236 (CA10 2000) (on remand from the Supreme Court to reconsider "in light of *Apprendi v. New Jersey*"); *United States v. Angle*, 230 F.3d 113, 124 (CA4 2000), *aff'd on reh'g en banc*, 2001 WL 732124, *2 (June 29, 2001); *United States v. Doggett*, 230 F.3d 160, 164-65 (CA5 2000); *United States v. Rogers*, 228 F.3d 1318, 1327-28 (CA11 2000); *United States v. Nordby*, 225 F.3d 1053, 1056 (CA9 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933-34 (CA8 2000).

> If the quantity of the controlled substance is equal to or greater than the amount[3] specified in 841(b)(1)**(A)**, the applicable sentencing range is 10 years to life imprisonment. App. 16-17.
>
> If the quantity of the controlled substance is equal to or greater than the amount specified in § 841(b)(1)**(B)**, the applicable sentencing range is 5 to 40 years' imprisonment. App. 19-20.
>
> For unspecified quantities of most controlled substances (including cocaine and cocaine base),[4] § 841(b)(1)**(C)** prescribes a sentencing range of 0 to 20 years' imprisonment. App. 21.

The circuits have split on whether *Apprendi* applies to cases in which a judge's drug-quantity finding by a preponderance of the evidence *exposes* the defendant to a higher maximum penalty under § 841(b)(1)(A) or (B), but the sentence *imposed* does not exceed the statutory maximum under § 841(b)(1)(C). The Ninth Circuit stands alone in concluding that "*Apprendi* held that a fact that increases the prescribed statutory maximum penalty to which a criminal defendant is *exposed* must be submitted to a jury and proven beyond a reasonable doubt." *United States v. Nordby*, 225 F.3d 1053, 1055 (CA9 2000) (emphasis added); *see also, e.g., United States v. Antonakeas*, No. 99-10002, 2001 WL 682370, *12 (CA9 June 19, 2001) ("[T]he . . . drug quantity determination violated *Apprendi*

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[3] The drug quantities specified in § 841(b)(1)(A) and (B) vary with the type of drug. App. 16-17, 19-20.

[4] Unspecified quantities of marijuana and most schedule III substances are covered by § 841(b)(1)(D), which prescribes a sentencing range of 0 to 5 years' imprisonment.

because it increased Appellant's *exposure* from 20 years to life.") (emphasis added); *United States v. Velasco-Heredia*, 249 F.3d 963, 968 (CA9 2001) (determining that the case, in which the district court *imposed* a sentence within the statutory maximum for the offense of conviction, "falls squarely under the rubric of *Apprendi*" because the judge's drug-quantity finding under a preponderance-of-the-evidence standard "*exposed* Velasco-Heredia to a greater statutory maximum punishment," and considering the sentence imposed only for purposes of harmless-error analysis) (emphasis added); *United States v. Garcia-Guizar*, 234 F.3d 483, 488 (CA9 2000) ("[T]he judge's finding, made under a preponderance-of-the-evidence standard, increased the statutory maximum penalty to which Garcia was *exposed* from twenty years to life, in violation of the constitutional rule recognized by *Apprendi*.") (emphasis added).

In contrast to the Ninth Circuit, the rest of the circuit courts have concluded that *Apprendi* places no constitutional limits on the penalty to which a defendant may be *exposed*, but rather is concerned only with the penalty that the district court *imposed*. *United States v. Fields*, 251 F.3d 1041, 1043-44 (CA D.C. 2001); *United States v. Pollard*, 249 F.3d 738, 739 (CA8 2001); *United States v. White*, 240 F.3d 127, 136 (CA2 2001); *United States v. Wilson*, 244 F.3d 1208, 1215-16 (CA10 2001);[5] *United States v. Robinson*, 241 F.3d

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[5] It is unclear whether some earlier Tenth Circuit cases apply an "exposed-penalty" or "imposed-penalty" interpretation of *Apprendi*. *See United States v. Heckard*, 238 F.3d 1222, 1235 (CA10 2001); *United States v. Hishaw*, 235 F.3d 565, 575-76 (CA10 2000). But most Tenth Circuit cases explicitly hold that *Apprendi* is inapplicable if the penalty being challenged

115, 119 (CA1 2001); *United States v. Huerta*, 239 F.3d 865, 876 (CA7 2001); *United States v. Williams*, 235 F.3d 858, 863 (CA3 2000); *United States v. Munoz*, 233 F.3d 410, 413-14 (CA6 2000); *United States v. Richardson*, 233 F.3d 223, 232 (CA4 2000); *United States v. Nealy*, 232 F.3d 825, 829 (CA11 2000); *United States v. Keith*, 230 F.3d 784, 787 (CA5 2000). That is, if a defendant is convicted of a § 841(b)(1)**(C)** offense, which applies when no drug quantity is specified and carries a penalty of 0 to 20 years' imprisonment, *Apprendi* purportedly applies only if the penalty *imposed* on the defendant is greater than 20 years. Provided that the judge *imposes* a penalty that does not exceed the § 841(b)(1)**(C)** maximum penalty of 20 years, it is deemed permissible for a judge to make a § 841(b)(1)**(A)** or **(B)** drug-quantity finding and thereby to *expose* the defendant to a statutory maximum penalty that exceeds the 20-year maximum for the § 841(b)(1)(C) offense of conviction. In such cases, "*Apprendi* is irrelevant." *Huerta*, 239 F.3d at 876 (quoting *Talbott v. Indiana*, 226 F.3d 866, 869 (CA7 2000)).

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does not exceed the statutory maximum prescribed for the offense of conviction (which in § 841 cases is usually § 841(b)(1)(C)). *See, e.g., United States v. Cernobyl*, No. 00-7033, 2001 WL 733406, *4 (CA10 June 19, 2001) (holding that the sentence imposed was error because it exceeded the prescribed maximum penalty for § 841(b)(1)(C)); *United States v. Jackson*, 240 F.3d 1245, 1248 (CA10 2001) (stating that the district court's *Apprendi* error "is best characterized as sentencing in excess of the statutory maximum penalty applicable to the offense of conviction"); *United States v. Thompson*, 237 F.3d 1258, 1262 (CA10 2001) (holding that if a defendant is sentenced within the range prescribed in § 841(b)(1)(C), "there is no *Apprendi* violation for a failure to charge and prove the amount of drugs involved").

Under the "imposed-penalty" interpretation, which has been adopted by the Fifth Circuit, *Apprendi* is irrelevant to Mr. Horton's case. Because he pleaded guilty only to the charge of conspiracy to possess with intent to distribute cocaine and cocaine base – and not to a specific drug quantity – Mr. Horton was convicted of the offense established in § 841(b)(1)(C). But because the drug quantity that the PSR attributed to him and that the district court adopted for sentencing purposes was a § 841(b)(1)(A) quantity, he was exposed to a statutory maximum penalty of life imprisonment. Mr. Horton's sentence of 151 months' imprisonment (12.6 years) does not exceed the statutory maximum prescribed for the offense to which he pleaded guilty and of which he was convicted (20 years). Thus, the court of appeals' decision was correct under Fifth Circuit law in responding to Mr. Horton's challenge to the district court's drug-quantity finding by reviewing that finding as a sentencing factor for clear error, rather than as an element for harmless or plain error. App. 2.

The Fifth Circuit's decision in Mr. Horton's case and the rest of the circuit court decisions that are premised on the "imposed-penalty" interpretation are wrong under *Apprendi*, which makes clear that the constitutional trigger is exposure to a penalty beyond the statutory maximum prescribed for the offense of conviction. Further, the "imposed-penalty" interpretation cannot be reconciled with this Court's cases on which *Apprendi* builds. This Court's review of this case is necessary to effectuate the rights of all criminal defendants under *Apprendi* to have alleged facts that increase the penalty to which they are

exposed submitted to a jury and proved beyond a reasonable doubt, and the right of all federal criminal defendants to have such facts stated in a grand jury indictment.[6]

A. The "Imposed-Penalty" Interpretation Conflicts with the *Apprendi* Decision.

In *Apprendi*, this Court explicitly held that the protections of a jury finding and a beyond-a-reasonable-doubt standard of proof apply when the determination of a fact increases the penalty to which a defendant is *exposed*. This Court stated that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Even if that sentence leaves unclear whether "penalty" means possible penalty or actual penalty, this Court makes the matter clear by restating its holding in the very next sentence: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the *prescribed* range of penalties to which a criminal defendant is *exposed*." *Id.* (quoting *Jones*

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[6] All the circuits have assumed that in federal criminal cases, *Apprendi* requires that all facts that increase the statutory maximum penalty beyond that prescribed for the offense of conviction be stated in an indictment as well as submitted to a jury and proved beyond a reasonable doubt. *See, e.g., United States v. Meshack*, 225 F.3d 556, 575 n.15 (CA5 2000) (noting that *Apprendi*, "in conjunction with *Jones*, clearly indicates that a fact which must be proved to the jury is an element of the offense that must also be alleged in the indictment") (citing *Jones v. United States*, 526 U.S. 227, 232 (1999)).

v. United States, 526 U.S. 227, 252 (1999)) (emphasis added). Indeed, the question on which this Court granted certiorari in *Apprendi* was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination *authorizing* an increase in the maximum prison sentence for an offense from 10 years to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." *Id.* at 469 (emphasis added).

This Court's reasoning in *Apprendi* also shows that the constitutional concern is with facts that increase the penalty to which a defendant is *exposed*. This Court emphasized that the factual finding at issue "is legally significant because it increased – indeed, it doubled – the maximum *range* within which the judge *could* exercise his discretion." *Id.* at 474 (emphasis added). Similarly, in its analysis of the relevant legal history, this Court explains that "[p]ut simply, facts that *expose* a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." *Id.* at 483 n.10 (emphasis added). And in distinguishing the *Apprendi* holding from *McMillan v. Pennsylvania*, this Court again highlighted the constitutional significance of *exposure* to penalties as a result of fact finding by pointing out that in that case, "[w]e did not . . . budge from the position . . . that a state scheme that keeps from the jury facts that *'expos[e]* [defendants] to greater or additional punishment' may raise serious constitutional concern." *Id.* at 486 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)) (emphasis added).

B. The "Imposed-Penalty" Interpretation Conflicts with this Court's Other Cases Holding that the Fifth Amendment Right to a Grand Jury Indictment and the Sixth Amendment Right to a Jury Trial Are Triggered by the Penalty to Which a Defendant Is Exposed.

The constitutional rights protected by the *Apprendi* rule – the right to indictment by a grand jury and the right to a trial by jury – are triggered by the penalty to which a defendant is *exposed*. The right to a grand jury indictment depends on "whether the crime is one for which the statutes *authorize* the court to award an infamous punishment, and not whether the punishment ultimately awarded *is* an infamous one." *Mackin v. United States*, 117 U.S. 348, 351 (1886) (emphasis added). The Sixth Amendment "require[s] the opportunity for a jury trial where imprisonment for more than six months is *authorized*." *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (emphasis added). Even before this Court drew the jury-trial line at six months in *Baldwin*, this Court had made clear that wherever that line was, it was based on the sentence to which a defendant was *exposed*. In *Duncan v. Louisiana*, this Court explicitly rejected the state's argument that the defendant's jury-trial right should depend on the sentence *imposed*, which was only 60 days:

> [T]he penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. . . . In the case before us the Legislature of Louisiana has made simple battery a criminal offense punishable by imprisonment for up to two years and a fine. The

> question, then, is whether a crime *carrying such a penalty* is an offense which Louisiana may insist on trying without a jury."

391 U.S. 145, 159-60 (1968) (emphasis added).

As *Mackin, Baldwin,* and *Duncan* tie the constitutional protections of grand jury indictment and jury trial to the punishment to which a criminal defendant is *exposed, Apprendi* ties the "element" status triggering those protections to the punishment to which a criminal defendant is *exposed*. The Fifth and Sixth Amendments are concerned with the *authorized* punishment because it indicates "[t]he degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct." *Apprendi,* 530 U.S. at 495. The authorized punishment tells not only society and defendants the degree of criminal culpability associated with particular conduct, but, more importantly, the authorized punishment also tells a *sentencing judge* the degree of criminal culpability associated with a particular *convicted* defendant. That the sentence ultimately imposed does not exceed the statutory maximum prescribed for the offense of conviction does not mean that the defendant would have received the same sentence absent the availability of the higher maximum to the sentencing judge. Indeed, "it is likely that the change in the range *available* to the judge affects his choice of sentence." *Id.* at 522 (Thomas, J., concurring) (emphasis added).

C. The "Imposed-Penalty" Interpretation Conflicts with this Court's Cases Explaining the Connection Between the "Element" Status of a Fact and Fifth and Sixth Amendment Rights.

Apprendi builds on this Court's case law establishing that the protections of the Fifth and Sixth Amendments delimit a sentencing judge's authority to deprive a defendant of life and liberty. *See, e.g., Duncan,* 391 U.S. at 156 ("[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."). Those protections apply only to facts that are deemed elements of the charged offense, and not to facts that are deemed mere sentencing factors, which are considered only *after* the procedures required by the Fifth and Sixth Amendment are supposed to have taken place. *Jones,* 526 U.S. at 227 ("Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."); *Gaudin v. United States,* 515 U.S. 506, 509-10 (1995) ("The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged."); *Sullivan v. Louisiana,* 508 U.S. 275, 278 (1993) (deeming it "self-evident" that the Fifth Amendment right to have all elements of a crime proved beyond a reasonable doubt and the Sixth Amendment right to a jury verdict "are interrelated" in that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a

reasonable doubt"); *In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Because a judge's authority to impose punishment must be "constrained at its outer limits" by the Fifth and Sixth Amendment protections of grand jury indictment, jury trial, and proof beyond a reasonable doubt, the *Apprendi* rule requires that facts *authorizing* an increase in the statutory maximum penalty be treated as elements of the offense for which that increased statutory maximum penalty is authorized. *Apprendi*, 530 U.S. at 483 n.10. As this Court explained:

> The term ["sentencing factor"] appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, *it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict*. Indeed, *it fits squarely within the usual definition of an "element" of the offense.*

Id. at 494 n.19 (emphasis added).

Under the mistaken "imposed-penalty" interpretation, an "*Apprendi*" fact such as drug quantity does not fall "within the usual definition of 'element' of the

offense"; rather, the "imposed-penalty" circuits have created a category of facts falling somewhere between elements and sentencing factors. Treating "exposed penalty" arguments as claims that *Apprendi* applies to *all* facts that increase the defendant's sentence under the Guidelines, the "imposed-penalty" circuits have responded by pointing to this Court's statements that "[t]he Guidelines are . . . not before the Court" and that nothing in the relevant history "suggests that it is impermissible for judges to exercise discretion . . . in imposing a judgment *within the range* prescribed by statute." *See, e.g., In re Sealed Case*, 246 F.3d 696, 698 (CA D.C. 2001); *Robinson*, 241 F.3d at 121; *White*, 240 F.3d at 135; *Williams*, 235 F.3d at 863; and *Nealy*, 232 F.3d at 829 n.3 (all citing *Apprendi*, 530 U.S. at 481, 497 n.21). Thus, the "imposed-penalty" circuits have concluded that although a § 841(b)(1)(A) or (B) drug quantity is not stated in the indictment, is not submitted to the jury, and is not proved beyond a reasonable doubt, judges may find § 841(b)(1)(A) and (B) drug quantities by a preponderance of the evidence and factor those quantities into the sentence determination as called for by the Guidelines, as long as that determination does not result in a sentence that exceeds the maximum permitted under § 841(b)(1)(C).

1. The "imposed-penalty" interpretation views the drug quantities in the Guidelines as sentencing factors and the quantities in § 841(b)(1)(A) and (B) as elements – but the quantities in the Guidelines are the same as those in § 841(b)(1)(A) and (B).

The problem with distinguishing between the drug quantities in the Guidelines and the drug quantities in § 841(b)(1)(A) and (B) is that the drug quantities in the Guidelines *are* the drug quantities in § 841(b)(1)(A) and (B). That is, the Sentencing Commission used the quantity ranges and corresponding penalty ranges in § 841(b)(1)(A) and (B) "as the primary basis for the guideline sentences" applicable to § 841 offenses. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, cmt. 10. That relationship is clear from a comparison of the quantity ranges in § 2D1.1(c) of the Guidelines with the quantities in § 841(b)(1)(A) and (B).

The lower-end quantities of the quantity ranges in § 2D1.1(c)(4) of the Guidelines match the quantities in § 841(b)(1)(A). For example, § 841(b)(1)(A)(i) prescribes the higher penalty range of 10 years to life imprisonment for "1 kilogram or more of . . . heroin." App. 16. The first quantity range in § 2D1.1(c)(4) of the Guidelines is "[a]t least 1 KG but less than 3 KG of Heroin." App. 26. Thus, because § 2D1.1(c)(4) quantities are assigned a base-offense level of 32, the base-offense levels of 32 and above correspond to § 841(b)(1)(A) quantities. App. 26-27. Similarly, the lower-end quantities of the quantity ranges in § 2D1.1(c)(7) of the Guidelines are the same as the quantities in § 841(b)(1)(B). Again using the heroin provisions as an example, § 841(b)(1)(B)(i) prescribes the higher

penalty range of 5 to 40 years' imprisonment for "100 grams or more of . . . heroin," and the heroin quantity range in § 2D1.1(c)(7) of the Guidelines is "[a]t least 100 G but less than 400 G of Heroin." App. 19, 29. Thus, because § 2D1.1(c)(7) quantities are assigned a base-offense level of 26, the base-offense levels of 26 and above correspond to § 841(b)(1)(B) quantities. App. 29-30.

2. The false distinction between the drug quantities in the Guidelines and the quantities in § 841(b)(1)(A) and (B) deprives defendants of their Fifth and Sixth Amendment rights.

In failing to recognize the relationship between the § 2D1.1(c)(4) and (7) drug quantities, which are deemed "sentencing factors" by the Guidelines, and the § 841(b)(1)(A) and (B) drug quantities, which are elements under *Apprendi*, the "imposed-penalty" circuits give the judge sentencing authority in violation of the Fifth and Sixth Amendments. If the *Apprendi* limit prohibits Congress from assigning the determination of drug quantity to the judge rather than to the jury, then that limit also prohibits the Sentencing Commission from assigning the determination of that *very same fact* to judges. That does not mean that all judicial fact finding under the Guidelines is invalid, but after *Apprendi*, the Sentencing Commission may not make a sentencing factor out of a *statutory* fact that exposes the defendant to a higher statutory maximum penalty.

At the very least, *Apprendi* requires that in cases such as Mr. Horton's, where drug quantity is not part of the

conviction, a judge may not find by a mere preponderance of the evidence a drug quantity corresponding to a base-offense level of 26 or higher, because those quantities are elements of the greater offenses stated in § 841(b)(1)(A) and (B). Put differently, the conviction of a § 841(b)(1)(C) offense confines the judge's discretion to the penalty ranges that result from a finding of quantities corresponding only to base-offense levels of 24 and below. App. 31.[7]

In Mr. Horton's case, because the district court determined that the PSR's § 841(b)(1)(A) drug-quantity finding was supported by a preponderance of the evidence and adopted that quantity for the purpose of sentencing him under the Guidelines, the district court sentenced him for the offense stated in § 841(b)(1)(A). The base-offense level corresponding to the § 841(b)(1)(A) drug quantity found by the district court is 34.[8] If the court had found the highest quantity permissible under *Apprendi*, Mr. Horton's base-offense level would have been 24. Assuming that the court applied the remainder of the Guidelines

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[7] Similarly, *Apprendi* at least requires that if a jury finds or the defendant pleads guilty to a § 841(b)(1)(B) drug quantity, the district court would not be authorized to find a § 841(b)(1)(A) quantity for purposes of determining the defendant's base-offense level under the Guidelines. For example, if a jury finds a defendant guilty of distributing "100 grams or more" of heroin (the amount specified in § 841(b)(1)(B)(i)), the district court would be authorized to find a quantity corresponding to base-offense levels 30 and below. *See* App. 27-30.

[8] The marijuana equivalent of the cocaine and cocaine base attributed to Horton was 5900.92 kilograms. Section 2D1.1(c)(3) of the Guidelines prescribes a base-offense level of 34 for 3000-10,000 kilograms of marijuana. App. 26.

analysis in good faith, and thus that the rest of Mr. Horton's sentence determination would remain the same, Mr. Horton's total offense level would have been 21,[9] which, with the criminal history category of IV, results in a sentencing range of 57 to 71 months. App. 13; U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A. That is decidedly less than the 151-to-188-month range that the district court used in sentencing Mr. Horton, and the highest sentence that the court was authorized to impose – 71 months – is less than half of the 151-month term that the court imposed on Mr. Horton. App. 5, 13.

Mr. Horton's case starkly demonstrates that in making a "sentencing factor" out of a statutory fact that authorizes a higher statutory penalty range, and tying the finding of that "sentencing factor" to a penalty range within the *statutory* penalty range (and thus basing it on the statutory range), the Guidelines have not merely made it "likely that the change in the range available to the judge affects his choice of sentence." The change in the authorized range leaves no option for the judge but to impose a higher sentence than the judge would have imposed in the absence of the finding of that statutory fact that increases the statutory penalty range.

Because Mr. Horton's sentence was below the § 841(b)(1)(C) maximum, the court of appeals construed his challenge to the district court's finding of a § 841(b)(1)(A) drug quantity as a challenge to a sentencing factor, which entitled him to review only for clear

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[9] That is, the base-offense level of 24 minus 3 points for acceptance of responsibility.

error. App. 2. The court of appeals should have treated drug quantity as an element rather than as a sentencing factor.

II. THE DISTINCTION BETWEEN THE "EXPOSED-PENALTY" AND "IMPOSED-PENALTY" INTERPRETATIONS OF *APPRENDI* IS NOT MERELY ACADEMIC: THERE IS A CRITICAL NEED FOR THIS COURT TO RESOLVE THE CIRCUIT SPLIT OVER THE PROPER INTERPRETATION OF *APPRENDI*.

One might agree that the "exposed-penalty" interpretation is what this Court held in *Apprendi* and is the standard to apply in the trial court *ex ante*, but also maintain that the "imposed-penalty" interpretation is the standard to apply at the appellate level *ex post*. That is, exposing a defendant convicted of a § 841(b)(1)(C) offense to the statutory range of 10 years to life imprisonment or 5 to 40 years' imprisonment under § 841(b)(1)(A) or (B) is *Apprendi* error, but it is harmless error if the defendant's actual sentence does not exceed the statutory maximum of 20 years' imprisonment prescribed for a § 841(b)(1)(C) offense. The "imposed-penalty" interpretation probably results in part from a collapsing of error and what is perceived by the circuit courts as harmless error. In this respect, the circuits are wrong.

From the *ex post* perspective of appellate courts, the harm is less apparent when the penalty ranges overlap, as they do in § 841(b)(1)(A), (B), and (C), than when the penalty ranges do not overlap. If, for example, the ranges in § 841(b)(1)(A), (B), and (C) were 0 to 20 years, 21 to 40 years, and 41 years to life, respectively, it is clear that

there would be no point in distinguishing between the penalty to which a defendant was exposed and the penalty imposed on the defendant for purposes of determining whether an *Apprendi* error was harmless. Upon closer analysis, however, it is also clear that such a distinction does not determine whether an *Apprendi* error was harmless in the case of overlapping penalty ranges because the source of potential harm is the same. In both cases, "it is likely that the change in the range *available* to the judge affects his choice of sentence." *Apprendi*, 530 U.S. at 522 (Thomas, J., concurring) (emphasis added). Under *Apprendi*, a fact that causes a change in the statutory maximum available to a judge is an element. Thus, if the judge errs by finding such a fact by a preponderance of the evidence, and consequently has the higher range available in sentencing the defendant, the inquiry must be whether the omission of an element from the offense can be deemed harmless. It is the penalty imposed – and not *Apprendi* – that is irrelevant.

Mr. Horton preserved his *Apprendi* claim by objecting to the PSR drug-quantity finding in the district court,[10] and he raised an *Apprendi* issue on appeal by arguing in his brief that the district court's procedure in finding drug quantity was impermissible. *See United States v. Strayhorn*, 250 F.3d 462, 467 (CA6 2001) (holding that the defendant preserved an *Apprendi* challenge to his sentence even though "he did not utter the words 'due process' [because] he made it well known that he disputed the district court's factual finding with respect to

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[10] *Apprendi* was decided after Mr. Horton was sentenced but before he appealed.

drug quantity"). *But see, e.g., United States v. Miranda*, 248 F.3d 434, 443 (CA5 2001) (reviewing an *Apprendi* claim for plain error because the appellants "did not specifically object to the procedure employed by the district court on the basis that they were entitled to a jury determination of drug quantity based on a beyond-a-reasonable-doubt standard of proof"). Even assuming that Mr. Horton's district court objections, which were directed at two specific allegations of quantity in the PSR, did not preserve *Apprendi* error, his more general challenge on appeal to the district court's process of finding drug quantity entitled him to plain-error review under *Apprendi*. The Fifth Circuit has recognized that *Apprendi* is essential in reviewing a sentencing court's drug-quantity finding, at least where the sentence *imposed* exceeds the statutory maximum prescribed for the offense of conviction (and thus *Apprendi* is applicable under Fifth Circuit law). In such cases, the Fifth Circuit has exercised its discretion to review the district court's drug-quantity finding for plain error even though the defendant's challenge to the finding did not refer to *Apprendi* or to the pertinent Fifth and Sixth Amendment rights. *Miranda*, 248 F.3d at 444 ("We cannot in good faith ignore *Apprendi* in a discussion of what process is due a criminal defendant who challenges a drug quantity determination."); *United States v. Garcia*, 242 F.3d 593, 599 n.5 (CA5 2001) ("It would be manifestly unjust under the circumstances to ignore the clear-cut, mechanical application of *Apprendi*. . . . "); *United States v. Vasquez-Zamora*, No. 99-55182, 2001 WL 585127, *2 n.4 (CA5 May 31, 2001) (same).

Even if this Court concludes that Mr. Horton's general challenge to the district court's fact-finding process

on appeal did not preserve an *Apprendi* claim, he urges this Court to review his case for plain error because of the importance of the questions presented in this petition. *See Silber v. United States*, 370 U.S. 717, 718 (1962) (" 'In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.' . . . Our own rules provide that 'the court, at its option, may notice a plain error not presented.' ") (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936), and current SUP. CT. R. 24(a)(1)). In *Clyatt v. United States*, this Court reviewed the sufficiency of the evidence for an element of the crime under a plain-error standard. 197 U.S. 207, 222 (1905). In reversing the case even though the defendant had not raised a sufficiency-of-the-evidence claim below, this Court stated that "it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements." *Id.* at 222.

The district court's drug-quantity finding by a preponderance of the evidence meets the plain-error test established by this Court. That finding was error that was plain, that affected substantial rights, and that "seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732 (1993).

Under the proper "exposed-penalty" interpretation of *Apprendi*, the finding was plain error because it exposed Mr. Horton to an increased statutory maximum

penalty. Given the parallel relationship between the drug quantities in § 841(b)(1)(A) and (B) of the U.S. Code and the quantities in § 2D1.1(c)(4) and (7) of the Guidelines, the error plainly affected Mr. Horton's substantial rights. As explained above, if the district court's discretion had been limited to § 841(b)(1)(C) quantity findings, the highest sentence that the court could have imposed would have been 71 months – less than half of the 151-month prison sentence that Mr. Horton is currently serving.

An omission of an element – here, drug quantity – "seriously affects the fairness, integrity or public reputation of judicial proceedings" unless "it is clear beyond a reasonable doubt that a properly worded indictment and a properly instructed jury would have found [the defendant] guilty." *Nance*, 236 F.3d at 826 (citing *United States v. Johnson*, 520 U.S. 461, 466-67 (1997)). That standard is clearly not met by the PSR evidence on which the district court based its drug-quantity finding. That evidence primarily included the testimony of a co-defendant and telephone conversations – to some of which Horton was not a party – that often left either the type or amount of drug unclear and that were not always corroborated by evidence of an actual purchase. The district court's *Apprendi* error thus "seriously affects the fairness, integrity [and] public reputation of judicial proceedings."

Mr. Horton respectfully asks this Court to grant certiorari and reverse the decision of the Fifth Circuit Court of Appeals affirming his sentence. In the alternative, he requests that this Court defer decision on whether to grant certiorari until the court of appeals rules on his pending motion to recall its mandate and consider his untimely petition for panel rehearing, which he filed to

ensure that his *Apprendi* claim is preserved. *See supra* note 1.

* * *

As made clear by the *Apprendi* majority opinion, and even more strongly by the two concurring opinions, the *Apprendi* holding is part of a long history in this country of maintaining the integrity of its criminal judicial system by keeping in place the constitutional limits on the ability of the government – including the judicial branch – to impose punishment on those subject to its jurisdiction. 530 U.S. at 476-90 (majority opinion); 498-99 (Scalia, J., concurring); 499-523 (Thomas, J., concurring). This Court's review of this case is necessary because the prevailing "imposed-penalty" interpretation permits courts to evade the *Apprendi* holding that it is unconstitutional for the legislature to give judges the authority to find "facts that increase the prescribed range of penalties to which a criminal defendant is *exposed*" by a mere preponderance of the evidence.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40576
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KELVIN LEDAL HORTON,
also known as Kevin,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. G-99-CR-10-11
(Filed Feb. 13, 2001)

Before SMITH, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Kelvin Ledal Horton appeals his sentence following a guilty-plea conviction for conspiracy to possess with intent to distribute cocaine and cocaine base, in violation

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), (b)(1)(B), (b)(1)(C) and 846.

Horton argues that the district court erred by adopting the drug amounts contained in the Presentence Report ("PSR") without verifying the accuracy of the quantities. A district court's findings about the quantity of drugs upon which a sentence should be based are factual findings, which this court reviews for clear error. *See United States v. Buchanan*, 70 F.3d 818, 833 (5th Cir. 1996). As Horton did not present any rebuttal evidence to refute the amounts, the district court properly adopted the PSR facts without further inquiry. *See United States v. Sherbak*, 950 F.2d 1095, 1099-1100 (5th Cir. 1992). Therefore the district court did not clearly err in determining the quantity of drugs attributable to Horton.

Horton also contends, for the first time on appeal, that the district court prevented him from presenting any rebuttal evidence regarding his objection. This claim is reviewed for plain error. *See United States v. Angeles-Mascote*, 206 F.3d 529, 530 (5th Cir. 2000). A review of the sentencing transcript reveals, contrary to Horton's assertion, that Horton declined the district court's opportunity to present additional arguments in support of this objection following the presentation of initial arguments by both parties. Accordingly, the district court did not commit plain error. *See id.* The sentence is AFFIRMED.

United States District Court

Southern District of Texas

Holding Session in Galveston

UNITED STATES OF AMERICA

v.

KELVIN LEDAL HORTON
AKA "KEVIN"

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
3:99CR00010-011

Gerson Darrell Bloom
Defendant's Attorney

[ ] See Additional Aliases – Sheet

THE DEFENDANT:

[✓] pleaded guilty to count(s) 1 on October 25, 1999 .

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ §§ 841(a)(1); (b)(1)(A); (b)(1)(B); (b)(1)(C) and 846	Conspiracy to possess with intent to distribute cocaine and cocaine base	03/16/1999	1

[ ] See Additional Counts of Conviction – Sheet

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____.

[ ] Count(s) _____ dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Social Security No.:
457-33-9629

Defendant's Date of Birth:
03/03/1971

Defendant's USM No.:
62303-079

Defendant's Residence Address:

206 1st Avenue North
Texas City TX 77590

Defendant's Mailing Address:

206 1st Avenue North
Texas City TX 77590

DB

May 17, 2000
Date of Imposition of Judgment

/s/ Lee H. Rosenthal
Signature of Judicial Officer

LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

5/22/00
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 151 month(s).
The term consists of ONE HUNDRED FIFTY-ONE (151) MONTHS as to Count 1.

[ ] See Additional Imprisonment Terms – Sheet

[✓] The court makes the following recommendations to the Bureau of Prisons:

That the defendant send at least 75% of his prison earnings to help support his minor children.

[✓] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] ___ on ___

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] by 2 p.m. on ___
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

The term consists of FIVE (5) YEARS as to Count 1.

[ ] See Additional Supervised Release Terms – Sheet

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[✓] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The

[✓] See Special Conditions of Supervision – Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or

characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) if restitution has been ordered, the defendant shall make restitution as ordered by the Court and in accordance with the applicable provisions of Title 18 U.S.C. § 2248, 2259, 2264, 2327, 3663, 3663A, and/or 3664. The defendant shall also pay the assessment imposed in accordance with Title 18 U.S.C. § 3013;

15) the defendant shall notify the U.S. Probation Office of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program, inpatient or outpatient, for the treatment of drug and/or alcohol addiction, dependency or abuse which may include, but not be limited to urine, breath, saliva and skin testing to determine whether the defendant has reverted to the use of drugs and/or alcohol. Further, the defendant shall participate as instructed and as deemed necessary by the probation officer and shall comply with all the rules and regulations of the treatment agency until discharged by the Program Director with the approval of the probation officer. The defendant shall further submit to drug detection techniques in addition to those performed by the treatment agency, as directed by the probation officer. The defendant will incur costs associated with such drug/alcohol detection and treatment, based on ability to pay as determined by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$100.00		

[ ] If applicable, restitution amount ordered pursuant to plea agreement..... _____

[ ] See Additional Terms for Criminal Monetary Penalties – Sheet

FINE

[ ] The above fine includes costs of incarceration and/or supervision in the amount of $0.00 .

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$0.00	$0.00	

[ ] See Additional Victims

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [✓] in full immediately; or

B [ ] _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than ____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (e.g. equal, weekly, monthly, quarterly) installments of _____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to: U.S. District Clerk, P.O. Box 2300, Galveston, TX 77553-2300.

[ ] Joint and Several

Case Number (Including Defendant No.)	Defendant Name	Joint and Several Amount

[ ] See Additional Joint & Several Defendants

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

[ ] See Additional Forfeited Property – Sheet

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program, are to be made as directed by the Court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[✓] The court adopts the factual findings and guideline application in the presentence report except:

the Court finds that the defendant did not possess a firearm in connection with this offense and that he has seven (7) criminal history points and not nine (9).

[ ] See Additional Findings and Guideline Application Exceptions – Sheet

Guideline Range Determined by the Court:

Total Offense Level: 31

Criminal History Category: IV

Imprisonment Range: 151 to 188 months

Supervised Release Range: 5 to 5 years

Fine Range: $15,000.00 to $4,000,000.00

[✓] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of

[ ] Partial or no restitution is ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[✓] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

The sentence meets the sentencing objectives of incapacitation, deterrence and punishment.

[ ] See Additional Reasons for Point Within Range – Sheet

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

[ ] See Additional Reasons For Departure From The Guideline Range – Sheet

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21 U.S.C. §841(a), (b)(1)(A)-(C):

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture of substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of

the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more

than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced

to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life

imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a), (c)(1)-(8):

(a) Base Offense Level (Apply the greatest):

(1) **43,** if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38,** if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

* * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity	**Base Offense Level**
(1) • 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); • 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); • 1.5 KG or more of Cocaine Base;	**Level 38**

- 30 KG or more of PCP, or 3 KG or more of PCP (actual);
- 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice";
- 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- 12 KG or more of Fentanyl;
- 3 KG or more of a Fentanyl Analogue;
- 30,000 KG or more of Marihuana;
- 6,000 KG or more of Hashish;
- 600 KG or more of Hashish Oil.

(2) • At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 36**

- At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 500 G but less than 1.5 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
- At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 KG but less than 1.5 KG of Methamphetamine

(actual), or at least 500 G but less than 1.5 KG of "Ice";

- At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 4 KG but less than 12 KG of Fentanyl;
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil.

(3) • At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 34**

- At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 150 G but less than 500 G of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
- At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual),

	or at least 150 G but less than 500 G of "Ice"; • At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); • At least 1.2 KG but less than 4 KG of Fentanyl; • At least 300 G but less than 1 KG of a Fentanyl Analogue; • At least 3,000 KG but less than 10,000 KG of Marihuana; • At least 600 KG but less than 2,000 KG of Hashish; • At least 60 KG but less than 200 KG of Hashish Oil.	
*(4)	• At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); • At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	**Level 32**

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* The Sentencing Commission used the drug quantities in 21 U.S.C. § 841(b)(1)(A)(i)-(viii) to create the ranges set forth in § 2D1.1(c)(4) of the Guidelines. For example, the quantity in § 841(b)(1)(A)(i) of "***1 kilogram*** or more of a mixture or substance containing a detectable amount of heroin" is the source of the lower end of the range for heroin in § 2D1.1(c)(4): "[a]t least ***1 KG*** but less than 3 KG of Heroin. . . . "

- At least 50 G but less than 150 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
- At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 400 G but less than 1.2 KG of Fentanyl;
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil.

[Section 841 (b)(1)(A) drug quantities begin at Level 32.]

(5)

- At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or Ii Opiates);
- At least 3.5 KG but less than 5 KG of cocaine (or the equivalent amount of other Schedule I or II Stimulants);

Level 30

- At least 35 G but less than 50 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
- At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 280 G but less than 400 G of Fentanyl;
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil.

(6) • At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 28**

- At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

	• At least 20 G but less than 35 G of Cocaine Base; • At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual); • At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice"; • At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule 1 or II Hallucinogens); • At least 160 G but less than 280 G of Fentanyl; • At least 40 G but less than 70 G of a Fentanyl Analogue; • At least 400 KG but less than 700 KG of Marihuana; • At least 80 KG but less than 140 KG of Hashish; • At least 8 KG but less than 14 KG of Hashish Oil.	
*(7)	• At least 100 G but less than 400 G of Heroin (or the equivalent	**Level 26**

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* The Sentencing Commission used the drug quantities in 21 U.S.C. § 841(b)(1)(B)(i)-(viii) to create the ranges set forth in § 2D1.1(c)(7) of the Guidelines. For example, the quantity in § 841(b)(1)(B)(i) of "***100 grams*** or more of a mixture or substance containing a detectable amount of heroin" is the source of the lower end of the range for heroin in § 2D1.1(c)(4): "[a]t least ***100 G*** but less than 400 G of Heroin. . . . "

amount of other Schedule I or II Opiates);

- At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 5 G but less than 20 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
- At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
- At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 40 G but less than 160 G of Fentanyl;
- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil.

[Section 841(b)(1)(B) drug quantities begin at Level 26.]

(8)	• At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); • At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); • At least 4 G but less than 5 G of Cocaine Base; • At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 g of PCP (actual); • At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice"; • At least 800 MG but less than 1 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); • At least 32 G but less than 40 G of Fentanyl; • At least 8 G but less than 10 G of a Fentanyl Analogue; • At least 80 KG but less than 100 KG of Marihuana; • At least 16 KG but less than 20 KG of Hashish; • At least 1.6 KG but less than 2 KG of Hashish Oil.	**Level 24** [SECTION 841(b)(1)(C) DRUG QUANTITIES CORRESPOND TO THE QUANTITIES IN LEVELS 24 AND BELOW.]